CUMULATIVE DIGEST

CH. 29
INDICTMENTS, INFORMAT IONS, COMPLAINTS

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§29-1
Manner of Charging – Discretion in Bringing Charges

People v. Determan, ___ Ill.App.3d ___, ___ N.E.2d ___ (5th Dist. 2009) (No. 5-08-0209, 10/21/09)

As an issue of first impression, the Appellate Court found that 750 ILCS 16/10, which provides that a criminal prosecution for wilfully failing to provide for the support of a spouse or a child "may be instituted and prosecuted . . . only upon the filing of a verified complaint by the person or persons receiving child or spousal support," requires that a verified complaint be filed with the circuit court before criminal proceedings are instituted. The court rejected the State's argument that §16/10 is satisfied by filing a verified complaint with the State's Attorney's office.

The court rejected the State's argument that §16/10 interferes with the State's Attorney's exclusive discretion to initiate and manage criminal prosecutions. Although the filing of a verified complaint with the trial court "is a necessary prerequisite" for the State's Attorney to file a charging instrument, once a verified complaint has been filed the State's Attorney retains discretion concerning whether and how to prosecute the case.

Because no verified complaint was ever filed with the trial court, it was improper for the State's Attorney's to initiate a criminal prosecution.

(Defendant was represented by Assistant Defender Joyce Randolph, Mt. Vernon.)

People v. Goad, 2013 IL App (4th) 120604 (Nos. 4-12-0604 & 4-12-0605 cons., 4/30/13)

1. The inherent authority to ensure a fair trial permits the trial court to dismiss an indictment where the defendant has been denied due process because of actual and substantial prejudice resulting from pre-indictment delay. A claim of pre-indictment delay is analyzed under a two-part test. First, the defendant must make a clear showing of actual and substantial prejudice to his ability to obtain a fair trial. A mere assertion of an inability to recall is insufficient to satisfy the defendant's burden.

If the defendant makes a clear showing, the burden shifts to the State to show the reasonableness of the delay. The trial court's ruling on a motion to dismiss an indictment due to unreasonable pre-indictment delay is reviewed *de novo*.

2. Where the defendant claims that he was prejudiced by pre-indictment delay, he is entitled to relief only if he can show "actual damage to [his] ability to obtain a fair trial." The court rejected the argument that pre-indictment delay of 18 months concerning two charges of possessing a hypodermic needle caused prejudice because it disrupted defendant's ability to leave the State to accept a job after he completed a sentence imposed on a guilty plea conviction for possession of a controlled substance. When defendant entered the plea for possession of a controlled substance, the State had knowledge of the hypodermic needle offenses but had decided not to file charges. The charges were brought after defendant had completed his sentence and MSR requirements in the guilty plea case, when defendant was planning to move to Arizona to accept a job.

The court concluded that the alleged prejudice to defendant's job prospects and continued rehabilitation constituted mere speculation concerning possible inconvenience, and was not the type of prejudice which justified shifting the burden to the State to show that the pre-indictment delay was reasonable.

3. The court also rejected the argument that defendant suffered substantial prejudice

because the delay in bringing charges until he entered a guilty plea on another charge allowed the State to circumvent the statutory limitations on consecutive sentences. Unlike **People v. Bredemeier**, 346 Ill. App. 3d 557, 805 N.E.2d 261 (5th Dist. 2004), where the delay deprived the defendant of an opportunity to serve an Illinois sentence concurrently with an Indiana sentence, defendant's arguments concerning consecutive sentencing demonstrated only the possibility of prejudice. The court also noted that defendant and his attorney were aware of the possibility of the additional charges when they negotiated the guilty plea agreement, and could have sought to include those offenses in the disposition.

The trial court's order granting defendant's motion to suppress was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Herman, 2012 IL App (3d) 110420 (No. 3-11-0420, modified 1/14/13)

"The State's Attorney of the county in which [a violation of the Illinois Vehicle Code] occurs shall prosecute all violations except when a violation occurs within the corporate limits of a municipality, the municipal attorney may prosecute if written permission to do so is obtained from the State's Attorney." 625 ILCS 5/16-102(c).

Defendant received citations for violations of the Illinois Vehicle Code, naming the People of the State of Illinois as prosecutor. A municipal attorney moved to amend the citations to designate the municipality, rather than the State, as the prosecuting authority. An assistant State's Attorney placed her initials on the face of the amended citation near the handwritten changes. The record contains no written permission from the State's Attorney granting the municipal attorney written authority to prosecute the citations. The motion to amend was not prepared by the State's Attorney and no request was made to amend the citations to allege violations of the municipal ordinance.

The municipality did not obtain acquire authority to prosecute by simply having the assistant State's Attorney initial the face of the citation. The lapse in prosecutorial authority could not be excused as harmless because the municipality's traffic ordinance prohibits the same conduct. A conviction under the Illinois Vehicle Code carries a harsher range of punishment than the same conviction pursuant to local ordinance. The circuit court considered the violations to arise solely out of the Code as alleged on the citation, as the court appointed the public defender at county expense and the State Appellate Defender on appeal.

The Appellate Court reversed defendant's conviction.

(Defendant was represented by Panel Attorney Joshua Sachs, Evanston.)

People v. Lee, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-10-0205, 6/29/11)

A prosecutor violates due process by exacting a price for a defendant's exercise of an established right, or by punishing a defendant for doing what the law plainly entitles him to do. Therefore, if a prosecutor responds to a defendant's successful exercise of his right to appeal by bringing a more serious charge against him, he acts unconstitutionally. A finding of prosecutorial vindictiveness is remedied through dismissal of the criminal charges brought against a defendant.

To establish prosecutorial vindictiveness, a defendant must demonstrate, through objective evidence that: (1) the prosecutor acted with genuine animus or retaliatory motive toward the defendant; and (2) the defendant would not have been prosecuted but for that animus or motive. If a defendant is unable to prove an improper motive with direct evidence, he may still present evidence of circumstances from which a vindictive motive may be presumed. To invoke such a presumption, a defendant must show that the circumstances pose

a reasonable likelihood of vindictiveness. When vindictiveness is presumed, the burden shifts to the government to present objective evidence justifying its conduct.

A presumption of vindictiveness will rarely be applied to a prosecutor's pretrial decisions. Prosecutors' charging decisions are presumptively lawful. Based on the broad discretion given prosecutors, and the wide range of factors that may properly be considered in making pretrial prosecutorial decisions, a prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct.

Defendant was charged in separate cases with aggravated criminal sexual assault and unlawful restraint of his wife on November 9, 2005, and the residential arson of her home on November 22, 2005. After defendant was convicted and sentenced on the first case, the State dismissed the residential arson charge. After defendant's convictions were reversed on appeal, the State reindicted defendant for residential arson. The circuit court dismissed the arson charge after finding that the State did not meet its burden of establishing that it was not being vindictive.

As a rule, no presumption of vindictiveness arises where the State indicts a defendant following a successful appeal from an unrelated conviction. The residential arson charge was completely separate from the other charges that defendant faced. The State charged residential arson before reversal of defendant's convictions. After the reversal, the State merely exercised its prosecutorial discretion to re-indict defendant for a charge that he had been indicted for previously, in a pretrial setting, in a separate felony case. Therefore, no presumption of vindictiveness was triggered by the refiling after defendant's successful appeal.

Because the defendant provided no proof of actual vindictiveness, the court reversed the order of dismissal.

People v. Peterson, 397 Ill.App.3d 1048, 923 N.E.2d 890 (3d Dist. 2010)

The prosecutor's charging decision is presumed to be lawful and motivated by proper considerations. A prosecutor has broad discretion whether to file charges and which charges to file. A claim of vindictive prosecution does not constitute an affirmative defense to a crime, and does not mandate pretrial discovery concerning the charging decision. (See **APPEAL**, §2-6(a) & **DISCOVERY**, §15-1).

People v. Rendak, 2011 IL App (1st) 082093 (No. 1-08-2093, 9/1/11)

A prosecution is vindictive and violates due process if it is undertaken to punish a defendant because he has done "what the law plainly allows him to do." **United States v. Goodwin**, 457 U.S. 368 (1982). Presumptions of vindictiveness exist only in a narrow set of circumstances, such as where a prosecutor brings additional charges and more serious charges after a defendant has successfully overturned a conviction, effectively subjecting the defendant to greater sanctions for pursuing a statutory or constitutional right. Generally, no such presumption exists in a pretrial setting where a prosecutor has broad discretion in charging a defendant. In the absence of a presumption, defendant must show actual prosecutorial vindictiveness, which requires: (1) objective evidence that the prosecutor had some animus or retaliatory motive; and (2) objective evidence that tends to show the prosecution would not have occurred absent the motive.

Defendant was charged with aggravated battery to a peace officer due to her conduct during her arrest for domestic battery and while being processed at the police station. The aggravated battery charges were originally nolled due to the officers' failure to appear, but an indictment was returned almost two years later, after defendant filed a civil rights lawsuit

alleging that she had been battered by the police without provocation and the parties' attempt to settle the lawsuit was unsuccessful.

The mere temporal sequence of these events was insufficient to create a presumption of vindictiveness or to establish actual vindictiveness. Mere opportunity for vindictiveness, and speculation based on such opportunity, is insufficient to establish any prosecutorial animus, due to the broad discretion afforded to a prosecutor at the pretrial stage. As a matter of public policy, to hold that timing alone would be sufficient would be too lax of a standard and encourage abuse. Suspects could strategically file civil suits against government agencies as either a tool to obtain leverage in negotiation or a precautionary measure in order to establish prosecutorial vindictiveness should they be prosecuted. Even assuming that there might be subjective evidence of animus, there was a clear shortage of objective evidence establishing both actual animus and that the prosecution would not otherwise have occurred.

People v. Velez, 2012 IL App (1st) 110801 (No. 1-11-0801, 12/21/12)

No prosecution can be pursued by information "unless a preliminary hearing has been held or waived in accordance with Section 109-3 and at that hearing probable cause to believe the defendant committed an offense was found, and the provisions of Section 109-3.1 of this Code have been complied with." 725 ILCS /111-2(a).

After compliance with §111-2(a), "such prosecution may be for all offenses, arising from the same transaction or conduct of a defendant even though the complaint or complaints filed at the preliminary hearing charged only one or some of the offenses arising from that transaction or conduct." 725 ILCS 5/111-2(f). Only charges completely unrelated to and fundamentally different from the offenses originally charged may not included.

After a finding of probable cause at a preliminary hearing on charges of armed robbery and aggravated vehicular hijacking, the State filed an information also charging armed habitual criminal, unlawful use of a weapon by a felon, and unlawful use or possession of a weapon by a felon. The circuit court dismissed these added counts because there had been no evidence at the preliminary hearing that defendant was a convicted felon.

Because the dismissed counts rose from the same conduct as the counts on which probable cause had been found at the preliminary hearing, the Appellate Court reversed. The charges were not completely unrelated or fundamentally different from the charges considered at the preliminary hearing because the evidence at the hearing showed that a gun had been used in the commission of the offenses.

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§29-2
Grand Jury Proceedings

In re Angel P., 2014 IL App (1st) 121749 (No. 1-12-1749, 6/27/14)

1. The trial court has inherent authority to dismiss criminal charges where there has been a clear denial of due process which prejudices the defense. To justify dismissal of an indictment, the denial of due process must be unequivocally clear. In addition, the prejudice must be actual and substantial.

A due process violation consisting of prosecutorial misconduct before a grand jury causes substantial prejudice only if in the absence of the misconduct, the grand jury would not have returned an indictment.

2. In his testimony before the grand jury, a Chicago police officer misrepresented the

age of the 16-year-old respondent as 17. The grand jury returned an indictment, but the charges were dismissed and replaced with juvenile charges after the minor presented the trial court with a certified copy of his birth certificate. The minor argued that the criminal charges should have been dismissed with prejudice because the indictment was obtained through perjured testimony.

The court held that the trial judge did not err by refusing to hold an evidentiary hearing to determine whether the officer's misrepresentation was intentional or unintentional. Whether the misrepresentation resulted in substantial prejudice did not depend on whether the officer acted intentionally or unintentionally. Instead, the relevant question was whether the deception was crucial to determining probable cause. The court concluded that even if the officer's misrepresentation of defendant's age was intentional, the belief that the defendant was 17 was unrelated to the finding of probable cause. Therefore, defendant did not suffer substantial prejudice.

The court acknowledged that the respondent would not have been indicted had his true age been known. However, the failure to indict would have been based on his status as a minor rather than on a lack of probable cause. Because the intentional or unintentional nature of the misrepresentation would have been irrelevant to whether a due process violation occurred, the trial court did not err by refusing to hold an evidentiary hearing on that issue.

Defendant's delinquency adjudication and disposition were affirmed.

People v. Bauer, 402 Ill.App.3d 1149, 931 N.E.2d 1283, 2010 WL 2780426 (5th Dist. 2010)

A grand jury has the power to issue subpoenas to obtain documents relevant to its inquiry when an individual is under investigation for a crime. Subpoenas need not be supported by probable cause. Subpoenas are returnable to the grand jury, but the grand jury may disclose the subpoenaed documents to the State's Attorney for the purpose of the State's Attorney furthering his responsibility to enforce the law. A State's Attorney can abuse the grand jury's subpoena power if the subpoenas are not prepared at the direction of the grand jury and returnable to it, but to the State's Attorney. Any error in the abuse of that power can be harmless if the State's Attorney would have received the documents from the grand jury had the proper procedure been followed.

In this case, the grand jury issued two subpoenas to a hospital where defendant had been taken following an accident seeking the results of a blood alcohol test performed on defendant. On both occasions, the subpoenaed documents were returned to the State's Attorney rather than the grand jury, as directed by the subpoena. The State's Attorney delivered the documents to the grand jury, which ultimately released the results of the blood test to the State's Attorney. The court held that there was no abuse of the grand jury's subpoena power because the State's Attorney did not attempt to circumvent the grand jury, but repeatedly appeared before it, kept it informed of the results of the subpoenas, and sought its permission to act under its authority. Even if the State's Attorney had abused the subpoena power, the error was harmless. The Illinois Vehicle Code, 625 ILCS 5/11-501.4(a) provides that results of blood alcohol tests performed on a person receiving treatment in an emergency room following a motor vehicle accident can be disclosed to law enforcement on request.

The Appellate Court affirmed the circuit court's denial of a motion to suppress the results of the blood alcohol test.

People v. Reimer, 2012 IL App (1st) 101253 (No. 1-10-1253, mod. op. 5/8/12)

1. In proceedings before the grand jury, the State's Attorney acts as an advisor in terms of the applicable law and the proposed charges. Challenges to grand jury proceedings are limited; a defendant may not challenge either the validity of an indictment returned by a legally constituted grand jury or the sufficiency of the evidence considered by the grand jury (so long as some evidence was presented). However, a defendant may challenge an indictment which resulted from prosecutorial misconduct which violated due process.

When ruling on a motion to dismiss an indictment, courts typically consider only the transcript of the proceedings before the grand jury. Prosecutorial misconduct before the grand jury warrants dismissal of the indictment if that misconduct violated due process and resulted in actual and substantial prejudice to the defendant. Prosecutorial misconduct violates due process if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjury or false testimony, or presents deceptive or inaccurate evidence. An indictment may also be dismissed where the prosecutor applied undue pressure or coercion so that the indictment is, in effect, the action of a prosecutor rather than the grand jury.

Whether the prosecutor's misconduct before the grand jury caused a prejudicial denial of due process is reviewed *de novo*.

2. The prosecutor engaged in misconduct when, in responding to questions from the grand jury, he twice elicited testimony which misstated the applicable law. Defendant was indicted for home repair fraud for allegedly entering into a home repair contract which he did not intend to perform or knew would not be performed. In response to questions by the grand jury, the prosecutor elicited testimony from a police detective that the Home Repair Fraud Statute "specifically shows some examples" from which intent can be inferred. The examples elicited by the prosecutor were found in 815 ILCS 515/3(c), which had been held unconstitutional because it created an unconstitutional presumption. (**People v. Watts**, 181 Ill. 2d 133, 692 N.E.2d 315 (1998)). The court concluded that despite the Illinois Supreme Court's holding in **Watts**, the testimony elicited by the prosecutor informed the grand jury that intent not to perform the contract could be presumed from the examples cited by the detective.

In addition, in response to a subsequent question from the grand jury, the prosecutor elicited testimony that home repair fraud does not require a finding that at the time defendant entered the contract, he lacked intent to complete the work. The court concluded that under the plain language of §515/3(a)(1) and the **Watts** decision, the elements of home repair fraud include the intent not to perform the work at the time the contract was entered.

3. To obtain dismissal of the indictment, the defendant was required to show that the prosecutor's misconduct resulted in actual and substantial prejudice. The court held that the defendant satisfied this burden because the evidence which the State presented to the grand jury focused exclusively on what happened after the work had been started, and did not concern defendant's intent when the contract was entered. The court concluded that defendant was prejudiced because it was not clear that the grand jury would have returned an indictment had it been properly informed of the applicable law.

The court rejected the State's argument that a finding of prejudice required that the prosecutor intentionally misstate the law to the grand jury. "Subjecting a defendant to criminal prosecution . . . based on the State's incorrect presentation of the law to the grand jury deprived him of his right to due process, whether the assistant State's Attorney's actions were intentional or not."

4. The court concluded, however, that the indictment need not be dismissed with prejudice. Dismissal with prejudice would be proper if the indictment was based on perjured testimony which was deliberately presented by the State and which was discovered by the defense rather than disclosed by the prosecution. Because no such concerns were present here,

the indictment was dismissed without prejudice.

The cause was remanded with instructions for the trial court to dismiss the indictment without prejudice.

(Defendant was represented by Assistant Defender Philip Payne, Chicago.)

People v. Sampson, 406 Ill.App.3d 1054, 943 N.E.2d 783 (3d Dist. 2011)

An indictment can be dismissed for prosecutorial misconduct if the misconduct rises to the level of a deprivation of due process or miscarriage of justice. The due process rights of a defendant may be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence. An indictment may also be dismissed where the prosecutor applies undue pressure or coercion so that the indictment is, in effect, that of the prosecutor rather than the grand jury. To warrant dismissal of an indictment, defendant must show that prosecutors prevented the grand jury from returning a meaningful indictment by misleading or coercing it.

An indictment is not subject to dismissal in every instance where a prosecutor fails to disclose the hearsay nature of a witness's testimony to the grand jury. Where the witness merely responded to the prosecutor's leading questions and made no statement that his testimony was based on personal observations, the prosecutor did not mislead or deceive the grand jury. The witness's inconsistent testimony regarding which hand of a correctional officer defendant had bitten was also not grounds for dismissal as the inconsistent testimony did not mislead or deceive the grand jury. Finally, the failure of the witness to disclose that he was a detective was not grounds for dismissal of the indictment where that fact did not disqualify him as a witness and the grand jury was not misled or deceived.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

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§29-3
Dismissal of Charges

People v. Hughes, 2012 IL 112817 (No. 112817, 11/29/12)

1. Jurisdiction stems from the Illinois Constitution, which assigns original jurisdiction to the circuit court in all "justiciable matters" except where the Supreme Court has original and exclusive jurisdiction. The court rejected the argument that the circuit court lacked jurisdiction to accept a guilty plea on a count on which a *nolle prosequi* order had been entered on the State's motion and which had not been refiled or reinstated.

To *nolle prosequi* a charge means simply that the State indicates an unwillingness to prosecute. Once the charge is *nol prossed*, the proceedings are terminated with respect to that particular charge, but the defendant is not acquitted. If a *nolle prosequi* is entered before jeopardy attaches, the State may reprosecute the defendant subject to other relevant statutory or constitutional defenses and so long as there is no harassment, bad faith, or fundamental unfairness.

2. Because jeopardy had not yet attached, the State's termination of the criminal prosecution by a *nolle prosequi* gave the State the right to either file a new charge or ask to vacate the dismissal and reinstate the original charge. The failure to do either did not deprive the trial court of jurisdiction, however, because an aggravated criminal sexual abuse

indictment is a "justiciable matter" involving an offense created by the Criminal Code. Thus, even if the indictment was legally defective due to the *nolle prosequi*, the trial court had jurisdiction over the cause and could accept the guilty plea.

3. The court rejected the argument that defendant's plea was involuntary because he was not aware that the Attorney General could use the guilty plea as a basis to file a sexually dangerous person's petition. Due process principles provide that a guilty plea is knowing and voluntary only if the defendant has been advised of the "direct consequences" of the plea. A "direct consequence" is one which "has a definite, immediate and largely automatic effect on the range of the defendant's sentence."

By contrast, the trial court need not advise the defendant of the "collateral consequences" of a guilty plea. A "collateral consequence" is one which the circuit court has no authority to impose and which results from a discretionary action by an agency that is outside the trial court's control. Whether a consequence of a guilty plea is direct or collateral is a question of law which is reviewed *de novo*.

The court concluded that the possibility of commitment under the Sexually Violent Person's Commitment Act is merely a collateral consequence of a guilty plea, because it does not follow directly from the fact of a conviction and requires an petition by a prosecuting authority. Thus, a person who is convicted of a predicate sexual offense may or may not become the subject of a sexually violent person's petition, depending on action by an entity that is outside the trial court's control. Because a sexually violent person's proceeding is merely a collateral consequence of a plea, the trial court need not advise the defendant of the possibility of such a proceeding before accepting a guilty plea.

The court concluded, however, that in order to render effective assistance of counsel, defense counsel must inform a defendant who pleads guilty to a sexually violent offense that he will be subject to evaluation for possible commitment under the Sexually Violent Persons Act.

4. In dissent, Justices Freeman and Burke found that unless the State took steps to reinstate the *nol prossed* charge, there was no "justiciable matter" on which a guilty plea could have been entered.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

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§29-4
Sufficiency of Charge

§29-4(a)
Generally

People v. Easley 2014 IL 115581 (No. 115581, 3/20/14)

1. 725 ILCS 5/111-3(c) provides that when the State seeks to impose an enhanced sentence due to a prior conviction, the charge must state the intent to seek the enhanced sentence and set forth the prior conviction in order to give notice to the defense. However, the prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense, and may not be disclosed to the jury during trial unless otherwise permitted by the

issues. An "enhanced" sentence is a sentence which is increased by a prior conviction from one class of offense to a higher classification. (725 ILCS 5/111-3(c)).

The court found that notice under §111-3(c) is required only if the prior conviction that would enhance the sentence is not an element of the charged offense. In other words, notice under §111-3(c) is not required when the prior conviction is a required element of the offense.

2. Defendant was convicted of unlawful use of a weapon by a felon, which is a Class 3 felony for a first offense and a Class 2 felony for a second or subsequent violation. The court concluded that the fact of a prior felony conviction is an element of the offense, and that notice under §111-3(c) is therefore not required. In addition, because a second or subsequent violation is a Class 2 felony with no possibility of any other sentence, the Class 2 sentence is not "enhanced" under the meaning of §111-3(c). Instead, it is the only sentence authorized for the offense.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Zimmerman, 239 Ill.2d 491, 942 N.E.2d 1228 (2010)

720 ILCS 5/24-1.6(a)(3)(D) creates the offense of aggravated unlawful use of a weapon for possession of a weapon by a person who has been adjudicated delinquent for an act which would have been a felony if committed by an adult. The court concluded that the plain language of §24-1.6 establishes that the prior juvenile adjudication is an element of aggravated unlawful use of a weapon, and not merely a factor enhancing the sentence for misdemeanor unlawful use of a weapon.

The court noted that §24-1.6 defines the offense of aggravated unlawful use of a weapon, and does not merely enhance the sentence for misdemeanor UUW, which is defined in a different section. The court also noted that §24-1.6 contains eight other factors, all of which constitute elements of the offense, and that it would have been illogical for the General Assembly to include one sentence enhancing factor.

Because the prior juvenile adjudication was an element of the offense, 725 ILCS 5/111-3(c) does not apply. (Section 111-3(c) states that the charge must include a prior conviction used to enhance the sentence for an offense, but the prior conviction is not to be disclosed to the jury.) Thus, the trial court did not err by informing the jury of a stipulation that defendant had a prior juvenile adjudication which satisfied the requirement of the offense.

(Defendant was represented by Deputy Defender Pete Carusona, Ottawa.)

People v. Barwan, Sandkam, & Klicko, 2011 IL App (2d) 100689 (Nos. 2-10-0689, 2-10-0690, 2-10-0691, 7/26/11)

1. A motion to dismiss a charge for failing to allege an offense challenges the sufficiency of the allegations of the complaint, and does not concern the evidence which might be introduced to support those allegations. A charging instrument is sufficient to state an offense where it is in writing, sets forth the nature and elements of the offense, and alleges the provision violated, the name of the accused, and the date and county of commission. Where the State seeks an enhanced sentence due to a prior conviction, the charge must state the prior conviction and the intent to seek the enhancement, although neither are elements of the offense. (725 ILCS 5/111-3).

Aggravated DUI charges which alleged that the defendants had committed DUI three times, and were therefore subject to Class 2 felony sentences under 625 ILCS 5/11-501(d)(2)(B), were sufficient to allege offenses although the second violation in each case involved pending charges that had not yet been resolved. Because the third-time offender provision is a sentencing enhancement, whether the evidence supports the enhancement is

determined at sentencing rather than before trial. Thus, it was premature for the trial court to consider the status of the predicate offenses when ruling on pretrial motions to dismiss.

2. The court declined to decide whether the Class 2 felony enhancement of 625 ILCS 5/11-501(d)(2)(B) would apply if at sentencing, a charge used as one of the predicate offenses was still pending in the trial court. The court noted, however, that under Supreme Court precedent, a charge on which the defendant received supervision is a prior "violation" for purposes of the Class 2 enhancement. (**People v. Sheehan**, 168 Ill.2d 298, 659 N.E.2d 1339 (1995)).

The trial court's pretrial orders dismissing the charges as insufficient were reversed, and the causes were remanded for further proceedings.

(Defendant was represented by Assistant Defender Kathleen Weck, Elgin.)

People v. Easley, 2012 IL App (1st) 110023 (No. 1-11-0023, 12/24/12)

Defendant was convicted of unlawful use of a weapon by a felon, a Class 3 felony that was enhanced to Class 2 because the offense was a second or subsequent violation. 725 ILCS 5/111-3(a) provides that when the State seeks an enhanced sentence because of a prior conviction, the charge must give notice to the defendant by stating its intent to seek an enhanced sentence and the prior conviction that will be used to seek the enhancement. An enhanced sentence is defined as a sentence which due to a prior conviction is increased from one level of offense to a higher level offense.

The court concluded that where defendant was charged with the Class 3 offense of unlawful use of a weapon by a felon, and the charge did not give notice that the State intended to seek a conviction for an enhanced Class 2 offense, the essence of the issue was whether the sentence imposed was proper. The court reached the issue as plain error, although the defense did not raise the question until asked by the Appellate Court during oral argument, because sentencing issues which affect substantial rights are excepted from the waiver doctrine. The court rejected the State's argument that defendant was raising a challenge to the sufficiency of the charging document, and was therefore required to show prejudice because the challenge had not been raised in the trial court.

The court also held that reversal was required although the nine-year sentence which the defendant received for the Class 2 felony was within the authorized sentencing range for a Class 3 conviction. Even where the sentence imposed on an erroneous conviction would have been authorized for the correct conviction, the sentence must be vacated because the trial court relied on an erroneous view of the authorized sentencing range.

The court vacated the enhanced Class 2 sentence and remanded the cause with directions to sentence the defendant to between two and 10 years in prison, the authorized sentencing range for the Class 3 felony of unlawful use of a weapon by a felon.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Espinoza, 2014 IL App (3d) 120766 (No. 3-12-0766 & 3-12-0050 cons., 8/7/14)

Under section 111-3 of the Code of Criminal Procedure, a defendant has a fundamental right to be informed of the nature of any criminal accusations against him. 725 ILCS 5/111-3. If a charging instrument is challenged before trial it must strictly comply with the pleading requirements of section 111-3, and if it does not, the proper remedy is dismissal.

The charging instrument must set forth the nature and elements of the offense, and where it charges an offense against a person, it must state the name of the person. The identity of the individual victim is an essential allegation of the charging instrument and the failure to identify the victim, if known, renders it deficient.

Here, the State refused to identify the juvenile victims by initials in the charging instruments. The trial court dismissed the charging instruments and the State appealed, arguing that defendants could not show that they were prejudiced since the victims could be identified in a bill of particulars or in discovery.

The Appellate Court rejected this argument holding that defendants were not required to show prejudice at this stage of the proceedings. When a charging instrument is attacked for the first time post-trial, a defendant must show that he was prejudiced in the preparation of his defense. But when a defendant makes a pretrial challenge, the State must strictly comply with the pleading requirements of section 111-3, or suffer dismissal. Here, defendants challenged the sufficiency of the charging instruments pre-trial and hence were not required to show prejudice.

The State also argued that its refusal to include the minors' initials in the charging instruments was justified on public policy grounds, pointing out that other states ban the disclosure of the identities of juvenile victims in any public document. The court rejected this argument, pointing out that Illinois has not enacted similar legislation, and that it is the province of the legislature, not the courts, to prescribe such a policy.

The court affirmed the dismissal of the charging instruments.

The dissent believed that the changes in criminal discovery rules have eliminated much of the reliance on the charging instrument as a source of information in preparation of a defense or a protection against double jeopardy. The dissent thus did not believe the omission of the juveniles names made the charging instruments defective.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Mimes, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-2747, 6/20/11)

1. In response to the United States Supreme Court's decision in **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the legislature enacted 725 ILCS 5/111-3(c-5), which provides that if an alleged fact other than the fact of a prior conviction is sought to be used to increase the range of penalties for an offense beyond the statutory maximum, "the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification prior to trial."

Defendant was charged with attempt first degree murder and was subject to an additional mandatory term of 25 years to life based on his personal discharge of a firearm that caused great bodily harm. 720 ILCS 5/8-4(c)(1)(D). The indictment alleged that defendant committed attempt first degree murder in that "he, without lawful justification, with intent to kill, did any act, to wit: shot Lenard Richardson about the body with a firearm, which constituted a substantial step toward the commission of the offense of first degree murder," and cited to subsection (a), but not subsection (c), of the attempt statute, as well as the first degree murder statute.

The court held that the plain language of the indictment alleged that defendant personally discharged a firearm. Since the indictment also cited both the attempt and the first degree murder statutes, the defendant could look to subsection (c)(1)(C) of the attempt statute to know that he was subject to a mandatory 20-year add-on for personally discharging a firearm.

The court agreed that the indictment did not sufficiently allege that the shooting proximately caused great bodily harm, even though it alleged that Richardson was shot about the body, because a gunshot wound does not necessarily satisfy the requirement of great bodily harm.

2. A charging instrument challenged before trial must strictly comply with the pleading

requirements of §111-3. When a challenge is made for the first time post-trial, defendant must show that he was prejudiced in the preparation of his defense. A charging instrument attacked post-trial is sufficient if it apprised the defendant of the precise offense charged with sufficient specificity to enable him to prepare his defense and to allow him to plead a resulting conviction as a bar to future prosecutions arising from the same conduct.

Even though the indictment did not sufficiently allege the great-bodily-harm requirement, the omission was not fatal where the challenge to the sufficiency of the indictment was first made on appeal. The defendant was apprised of the serious nature of Richardson's injuries long before trial. The police reports mentioned that Richardson had suffered serious injuries and the defense was aware at the bond hearing that Richardson was paralyzed as a result of the shooting. Since the indictment cited to the attempt and first degree murder statutes, defendant could look to subsection (c)(1)(D) of the attempt statute to find the missing sentencing-enhancement factor. Therefore, defendant was not prejudiced in the preparation of his defense.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Nowells, 2013 IL App (1st) 113209 (No. 1-11-3209, 11/7/13)

725 ILCS 5/111-3(c) provides that where the State seeks an enhanced sentence based on a prior conviction, the charge must give notice of the intent to seek an enhanced sentence and allege the prior conviction. "However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial."

The court concluded that under the plain language of §111-3(c), the charge is only required to give notice of the intent to seek an enhanced sentence if the prior conviction is not an element of the offense. Where defendant was charged with unlawful use of a weapon by a felon, which includes as an element a prior felony conviction, §111-3(c) was inapplicable although UUW by a felon is a Class 2 felony which carries a special sentencing range of three to 14 years. The court stressed that the State was not seeking an enhanced sentence, but was merely seeking a conviction which would be subject to the only authorized sentence for the offense.

The court rejected precedent which held that the State is required to comply with §111-3(c) when charging UUW by a felon. (See **People v. Easley**, 2012 IL App (1st) 110023 (l/a granted 3/27/13 as No. 115581)).

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Pryor, 2013 IL App (1st) 121792 (No. 1-12-1792, 12/27/13)

Under 725 ILCS 5/111-3(c), when the State seeks an enhanced sentence based on a defendant's prior conviction it must specifically state its intention to do so in the charging instrument, and it must state the prior conviction that is the basis of the enhancement. Subsection (c) defines an enhanced sentence as a sentence which is increased by a prior conviction from one class of offense to a higher class.

Here, the State charged defendant with unlawful use of a weapon by a felon (UUWF) under 720 ILCS 5/24-1.1(a). Under subsection (e) of the UUWF statute, the sentence for this offense is a Class 3 felony, but any second or subsequent violation is a Class 2 felony. The charging instrument alleged that defendant had a previous conviction for UUW under case number 07 CR 18901 in violation of section 24-1.1(a). The parties stipulated at trial that defendant had a prior felony conviction under case number 07 CR 18901, but did not state

what the prior conviction was for. The State did not introduce a certified copy of conviction. The presentence investigation report stated that defendant had been convicted of an offense under section 24-1. At sentencing, the State argued that the sentence should be enhanced due to "a prior gun conviction." The trial court agreed and imposed a Class 2 sentence on defendant.

On appeal, defendant argued that the State failed to provide him with notice of its intent to seek an enhanced sentenced as required by section 111-3. The Appellate Court agreed, holding that the State sought an enhanced sentence due to a prior conviction and that the charging instrument failed to state the prosecutor's intention to seek an enhanced sentence. The court also held that the charging instrument failed to state the prior conviction which served as the basis of the enhancement since the charge only mentioned the case number of defendant's prior conviction.

The Appellate Court noted that in two prior cases, **People v. Easley**, 2012 IL App (1st) 110023 and **People v. Whalum**, 2012 IL App (1st) 110959, the court reached a similar result. The court declined to follow **People v. Nowells**, 2013 IL App (1st) 113209, which held that section 111-3(c) does not apply when the prior conviction used to enhance the offense is an element of the offense. The court also distinguished **Nowells** because there the defendant had been placed on actual notice about the type and class of the prior offense being relied on by the State. The court noted that **Easley** is pending in the Illinois Supreme Court as No. 115581.

Although defendant forfeited this issue by failing to properly object at trial, the Appellate Court addressed the issue as plain error since the improper enhancement of the class of offense implicates a defendant's substantial rights. The court vacated defendant's sentence and remanded for resentencing.

Justice Palmer, dissenting, would have followed **Nowells** instead of **Easley** and **Whalum**.

(Defendant was represented by Assistant Defender Jim Morrissey, Chicago.)

People v. Rich, 2011 IL App (2d) 101237 (No. 2-10-1237, 11/3/11)

Under 720 ILCS 5/6-1, a criminal conviction cannot be entered for an offense which occurred when the defendant was under the age of 13. Thus, the trial court properly dismissed an indictment which alleged that defendant committed aggravated criminal sexual assault when he was 12 years old.

People v. Whalum, 2012 IL App (1st) 110959 (No. 1-11-0959, 12/24/12)

"When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. *** For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of an offense to another higher level of classification of offense ***; it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c).

The offense of unlawful use of a weapon by a felon is a Class 3 felony, but it is enhanced to a Class 2 felony if the defendant has been convicted of a forcible felony. 720 ILCS 5/24-1.1(e). Because the statute elevates the classification of the offense, the State must indicate in the charging instrument which class of offense it seeks to charge. Because the State failed to do so in the prosecution of defendant for UUW by a felon, the cause was remanded for defendant to be sentenced for a Class 3 felony.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

People v. Whalum, 2014 IL App (1st) 110959-B (No. 1-11-0959, mod. op. 11/10/14)

1. Section 111-3(c) of the Code of Criminal Procedure requires the prosecution to specifically state in the charging instrument its intention to seek an enhanced sentence based on a prior conviction. 725 ILCS 5/111-3(c). In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice to defendant under section 111-3(c) only applies when the prior conviction used to enhance the sentence is not an element of the offense.

2. Both **Easley** and the present case involved the offense of unlawful use of a weapon by a felon (UUWF). 720 ILCS 5/24-1.1(a). To prove UUWF the State must show that defendant possessed a weapon or ammunition and had a prior felony conviction. The sentence for UUWF is dictated by subsection (e) and depends on the nature of the prior felony. If the prior felony is UUWF or a number of other felonies listed in subsection (e) (including forcible felonies and a Class 2 or greater felony drug offense), then UUWF is a Class 2 felony; otherwise it is a Class 3 felony.

In **Easley** the charging instrument specifically listed UUWF as the prior felony that would be used to prove the prior conviction element of the offense. Here, by contrast, the prior felony was a drug conviction from Wisconsin. The Appellate Court held that this prior offense did not fall under any of the felonies listed in subsection (e) and therefore the prior conviction did not make defendant's UUWF offense a Class 2 felony.

3. The court rejected the State's argument that the Wisconsin conviction for delivery of a controlled substance was the equivalent of one of the drug-related offenses listed in subsection (e). The legislature did not set out a general description of a crime in subsection (e) that would have been comparable to crimes from other states. It instead listed several specific statutes defining Illinois offenses. By doing so, the legislature did not intend to include equivalent offenses from other states under subsection (e).

4. Because the State relied on another prior conviction (other than the prior Wisconsin drug conviction that was charged as an element of the offense) to enhance defendant's sentence to a Class 2 felony, **Easley** did not control the outcome of this case. Instead, the State was required to provide defendant with notice under section 11-3(c) that it intended to seek an enhanced sentence. Since it failed to do so, defendant's case was remanded for re-sentencing as a Class 3 felon.

(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

People v. Whalum, 2014 IL App (1st) 110959-B (No. 1-11-0959, mod. op. 11/10/14)

1. Section 111-3(c) of the Code of Criminal Procedure requires the prosecution to specifically state in the charging instrument its intention to seek an enhanced sentence based on a prior conviction. 725 ILCS 5/111-3(c). In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice to defendant under section 111-3(c) only applies when the prior conviction used to enhance the sentence is not an element of the offense.

2. Both **Easley** and the present case involved the offense of unlawful use of a weapon by a felon (UUWF). 720 ILCS 5/24-1.1(a). To prove UUWF the State must show that defendant possessed a weapon or ammunition and had a prior felony conviction. The sentence for UUWF is dictated by subsection (e) and depends on the nature of the prior felony. If the prior felony is UUWF or a number of other felonies listed in subsection (e) (including forcible felonies and a Class 2 or greater felony drug offense), then UUWF is a Class 2 felony; otherwise it is a Class 3 felony.

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(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

People v. Wooden, 2014 IL App (1st) 130907 (No. 1-13-0907, 8/8/14)

Under 725 ILCS 5/111-3(c) when the State seeks to impose an enhanced sentence due to a prior conviction, the charge must state the intent to seek the enhanced sentence and set forth the prior conviction to give the defense notice. In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice under §111-3(c) is required only if the prior sentence that would enhance the sentence is not an element of the charged offense.

Here, the State charged defendant with unlawful use of a weapon by a felon, alleging that the prior felony was vehicular hijacking. The prior conviction for vehicular hijacking was used to elevate the offense from a Class 3 to a Class 2 felony on the basis that it was a forcible felony. 720 ILCS 5/24-1.1(e).

Defendant argued that he was improperly convicted of a Class 2 felony because the State did not give him notice that it would seek an enhanced sentence. Defendant further argued that **Easley** did not apply to his case because vehicular hijacking is not per se a forcible felony. Vehicular hijacking is not one of the specifically enumerated offenses in the forcible felony statute and, according to defendant, does not fall within the residual clause definition of forcible felony.

The Appellate Court rejected this argument finding that vehicular hijacking falls squarely within the definition of forcible felony. A defendant commits vehicular hijacking when he knowingly takes a motor vehicle from a person by the use or imminent threat of force. 720 ILCS 5/18-3(a). A forcible felony includes several specifically enumerated felonies and any other felony which involves the use or threat of physical force or violence against any person. 720 ILCS 5/2-8.

The act of taking a motor vehicle from a person by force or threat of imminent force necessarily involves at least the contemplation that violence might be used. Defendant could not provide, and the court could not conceive of, a situation where a defendant could commit vehicular hijacking without using or threatening physical force or violence. Vehicular hijacking thus falls within the definition of forcible felony and **Easley** controls the outcome of this case. Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Sam Hayman, Chicago.)

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§29-4(b)
In Charging Offense (Also See Substantive Offense)

People v. Barwan, Sandkam, & Klicko, 2011 IL App (2d) 100689 (Nos. 2-10-0689, 2-10-0690, 2-10-0691, 7/26/11)

1. A motion to dismiss a charge for failing to allege an offense challenges the sufficiency of the allegations of the complaint, and does not concern the evidence which might be introduced to support those allegations. A charging instrument is sufficient to state an offense where it is in writing, sets forth the nature and elements of the offense, and alleges the provision violated, the name of the accused, and the date and county of commission. Where the State seeks an enhanced sentence due to a prior conviction, the charge must state the prior conviction and the intent to seek the enhancement, although neither are elements of the offense. (725 ILCS 5/111-3).

Aggravated DUI charges which alleged that the defendants had committed DUI three times, and were therefore subject to Class 2 felony sentences under 625 ILCS 5/11-501(d)(2)(B), were sufficient to allege offenses although the second violation in each case involved pending charges that had not yet been resolved. Because the third-time offender provision is a sentencing enhancement, whether the evidence supports the enhancement is determined at sentencing rather than before trial. Thus, it was premature for the trial court to consider the status of the predicate offenses when ruling on pretrial motions to dismiss.

2. The court declined to decide whether the Class 2 felony enhancement of 625 ILCS 5/11-501(d)(2)(B) would apply if at sentencing, a charge used as one of the predicate offenses was still pending in the trial court. The court noted, however, that under Supreme Court precedent, a charge on which the defendant received supervision is a prior "violation" for purposes of the Class 2 enhancement. (**People v. Sheehan**, 168 Ill.2d 298, 659 N.E.2d 1339 (1995)).

The trial court's pretrial orders dismissing the charges as insufficient were reversed, and the causes were remanded for further proceedings.

(Defendant was represented by Assistant Defender Kathleen Weck, Elgin.)

People v. Easley, 2012 IL App (1st) 110023 (No. 1-11-0023, 12/24/12)

Defendant was convicted of unlawful use of a weapon by a felon, a Class 3 felony that was enhanced to Class 2 because the offense was a second or subsequent violation. 725 ILCS 5/111-3(a) provides that when the State seeks an enhanced sentence because of a prior conviction, the charge must give notice to the defendant by stating its intent to seek an enhanced sentence and the prior conviction that will be used to seek the enhancement. An enhanced sentence is defined as a sentence which due to a prior conviction is increased from one level of offense to a higher level offense.

The court concluded that where defendant was charged with the Class 3 offense of unlawful use of a weapon by a felon, and the charge did not give notice that the State intended to seek a conviction for an enhanced Class 2 offense, the essence of the issue was whether the sentence imposed was proper. The court reached the issue as plain error, although the defense did not raise the question until asked by the Appellate Court during oral argument, because sentencing issues which affect substantial rights are excepted from the waiver doctrine. The court rejected the State's argument that defendant was raising a challenge to the sufficiency of the charging document, and was therefore required to show prejudice because the challenge

had not been raised in the trial court.

The court also held that reversal was required although the nine-year sentence which the defendant received for the Class 2 felony was within the authorized sentencing range for a Class 3 conviction. Even where the sentence imposed on an erroneous conviction would have been authorized for the correct conviction, the sentence must be vacated because the trial court relied on an erroneous view of the authorized sentencing range.

The court vacated the enhanced Class 2 sentence and remanded the cause with directions to sentence the defendant to between two and 10 years in prison, the authorized sentencing range for the Class 3 felony of unlawful use of a weapon by a felon.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Mimes, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-2747, 6/20/11)

1. In response to the United States Supreme Court's decision in **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the legislature enacted 725 ILCS 5/111-3(c-5), which provides that if an alleged fact other than the fact of a prior conviction is sought to be used to increase the range of penalties for an offense beyond the statutory maximum, "the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification prior to trial."

Defendant was charged with attempt first degree murder and was subject to an additional mandatory term of 25 years to life based on his personal discharge of a firearm that caused great bodily harm. 720 ILCS 5/8-4(c)(1)(D). The indictment alleged that defendant committed attempt first degree murder in that "he, without lawful justification, with intent to kill, did any act, to wit: shot Lenard Richardson about the body with a firearm, which constituted a substantial step toward the commission of the offense of first degree murder," and cited to subsection (a), but not subsection (c), of the attempt statute, as well as the first degree murder statute.

The court held that the plain language of the indictment alleged that defendant personally discharged a firearm. Since the indictment also cited both the attempt and the first degree murder statutes, the defendant could look to subsection (c)(1)(C) of the attempt statute to know that he was subject to a mandatory 20-year add-on for personally discharging a firearm.

The court agreed that the indictment did not sufficiently allege that the shooting proximately caused great bodily harm, even though it alleged that Richardson was shot about the body, because a gunshot wound does not necessarily satisfy the requirement of great bodily harm.

2. A charging instrument challenged before trial must strictly comply with the pleading requirements of §111-3. When a challenge is made for the first time post-trial, defendant must show that he was prejudiced in the preparation of his defense. A charging instrument attacked post-trial is sufficient if it apprised the defendant of the precise offense charged with sufficient specificity to enable him to prepare his defense and to allow him to plead a resulting conviction as a bar to future prosecutions arising from the same conduct.

Even though the indictment did not sufficiently allege the great-bodily-harm requirement, the omission was not fatal where the challenge to the sufficiency of the indictment was first made on appeal. The defendant was apprised of the serious nature of Richardson's injuries long before trial. The police reports mentioned that Richardson had suffered serious injuries and the defense was aware at the bond hearing that Richardson was paralyzed as a result of the shooting. Since the indictment cited to the attempt and first degree murder statutes, defendant could look to subsection (c)(1)(D) of the attempt statute to find the

missing sentencing-enhancement factor. Therefore, defendant was not prejudiced in the preparation of his defense.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Moman, 2014 IL App (1st) 130088 (No. 1-13-0088, 8/14/14)

A defendant has a due process right to notice of the State's charges, and may not be convicted of an offense the State has not charged. But, a defendant may be convicted of an uncharged offense if it is a lesser-included offense of the charged offense.

To determine whether an uncharged offense is a lesser-included offense, Illinois courts employ the charging instrument test. Under this test, the court must determine whether: (1) the description in the charging instrument contains a "broad foundation or main outline" of the lesser offense; and (2) the trial evidence rationally supports a conviction of the lesser offense.

Here, the State charged defendant with aggravated battery premised on complainant's status as a correctional officer. The charged alleged that defendant caused bodily harm to complainant knowing that he was a peace officer performing his official duties. The trial court found defendant guilty of obstructing a peace officer, which is defined as knowingly obstructing the performance of a known peace officer of any authorized act within his official capacity. 720 ILCS 5/31-1(a).

The charging instrument plainly stated the "broad foundation or main outline" of obstructing a peace officer. It alleged that defendant battered the officer while he was performing his official duties, claims which sufficiently mirror the elements of obstructing a peace officer. Although the indictment did not use the identical language of the statute defining the lesser offense, it stated facts from which the elements could be reasonably inferred. In particular, the allegation that the officer was performing his official duties was sufficient to notify defendant of the element that the officer was engaged in an authorized act within his official capacity.

The trial evidence also rationally supported a conviction on the lesser offense. It showed that defendant repeatedly kicked the officer while he was placing defendant in restraints. This evidence supports a finding that defendant obstructed a peace officer while he performed an authorized act.

The conviction for obstruction of a peace officer was affirmed.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Nowells, 2013 IL App (1st) 113209 (No. 1-11-3209, 11/7/13)

725 ILCS 5/111-3(c) provides that where the State seeks an enhanced sentence based on a prior conviction, the charge must give notice of the intent to seek an enhanced sentence and allege the prior conviction. "However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial."

The court concluded that under the plain language of §111-3(c), the charge is only required to give notice of the intent to seek an enhanced sentence if the prior conviction is not an element of the offense. Where defendant was charged with unlawful use of a weapon by a felon, which includes as an element a prior felony conviction, §111-3(c) was inapplicable although UUW by a felon is a Class 2 felony which carries a special sentencing range of three to 14 years. The court stressed that the State was not seeking an enhanced sentence, but was merely seeking a conviction which would be subject to the only authorized sentence for the

offense.

The court rejected precedent which held that the State is required to comply with §111-3(c) when charging UUW by a felon. (See **People v. Easley**, 2012 IL App (1st) 110023 (l/a granted 3/27/13 as No. 115581)).

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Walton, 2013 IL App (3d) 110630 (No. 3-11-0630, 5/29/13)

A defendant has a fundamental right to be informed of the nature and cause of criminal accusations made against her. As part of that right, the Code of Criminal Procedure provides that the charging instrument must set forth the nature and elements of the offense charged. 725 ILCS 5/111-3(a)(3). When challenged for the first time on appeal, the charging instrument will be found sufficient if it: (1) apprised the accused of the precise offense with sufficient specificity to prepare her defense; and (2) would allow her to plead a resulting conviction as a bar to future prosecutions arising from the same conduct.

The State charged the defendant with one act of felony theft under 720 ILCS 16-1(a)(4) in that she obtained control of multiple items of stolen property from various stores having a total value of more then $500 but not exceeding $10,000, under such circumstances as would reasonably induce said defendant to believe the property was stolen. If based on the commission of separate acts, this charge was sufficient to charge felony theft only if it alleged, as required by the joinder statute (725 ILCS 5/111-4(c), that the acts were committed in furtherance of a single intention and design. The record is silent on whether defendant obtained control over the stolen property through one or multiple acts.

The Appellate Court concluded that it could reduce defendant's conviction to a conviction for the lesser-included offense of felony theft under 720 ILCS 5/16-1 (a)(1), which is violated whenever a person maintains possession over items of property she does not own. This is a continuing crime that could be alleged as a single act of possession and does not require an allegation that defendant's acts were committed in furtherance of a single intention and design.

(Defendant was represented by Assistant Deputy Defender Larry Wells, Mt. Vernon.)

People v. Whalum, 2012 IL App (1st) 110959 (No. 1-11-0959, 12/24/12)

"When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. *** For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of an offense to another higher level of classification of offense ***; it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c).

The offense of unlawful use of a weapon by a felon is a Class 3 felony, but it is enhanced to a Class 2 felony if the defendant has been convicted of a forcible felony. 720 ILCS 5/24-1.1(e). Because the statute elevates the classification of the offense, the State must indicate in the charging instrument which class of offense it seeks to charge. Because the State failed to do so in the prosecution of defendant for UUW by a felon, the cause was remanded for defendant to be sentenced for a Class 3 felony.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

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§29-5
Amendment of

People v. Adams, 404 Ill.App.3d 405, 935 N.E.2d 693 (1st Dist. 2010)

An indictment may be amended any time to correct formal defects, including miswritings. 725 ILCS 5/111-5(a). An amendment to an indictment to include an essential element must originate with the grand jury.

An indictment for armed habitual criminal correctly identified the case number of a prior conviction alleged as an element of the offense, but misstated the nature of the prior conviction. The court held that the prosecution could amend the indictment to accurately state the nature of the prior offense. The amendment related to a formal defect in the nature of a miswriting that could be corrected at any time.

(Defendant was represented by Assistant Defender Grace Palacio, Chicago.)

People v. Jones, 2012 IL App (2d) 110346 (No. 2-11-0346, 12/19/12)

1. Once the grand jury has returned an indictment, it may not be broadened through amendment except by the grand jury itself. This rule ensures that individuals' rights are not at the mercy or control of the prosecutor. An exception to this rule exists allowing correction of formal defects if no surprise or prejudice results to the defendant. The lack of surprise by an amendment supports a finding that the amendment is merely technical.

A list of formal defects that may be corrected by amendment is contained in 725 ILCS 5/111-5, but the list is not exclusive. An amendment is substantive and therefore improper if it: (1) materially alters the charge, and (2) it cannot be determined whether the grand jury intended the alteration.

An abuse-of-discretion standard applies to review of a trial court's decision to allow or deny the amendment of an indictment.

2. The trial court did not abuse its discretion in allowing the amendment of an aggravated battery indictment to change the name of the victim. The identity of the victim is an essential element of an offense, but amending the indictment to change the name of the victim on the day of trial was nonetheless acceptable as the correction of a formal defect. Defendant acknowledged to the court that the grand jury transcript supported a charge of aggravated battery of the victim named in the amended charge, although it also supported the original charge. Defendant declined the court's offer of a continuance when the amendment was made, so defendant was not surprised or prejudiced by the amendment.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

People v. Shipp, 2011 IL App (2d) 100197 (No. 2-10-0197, 10/5/11)

A charge must set forth the nature and elements of the offense, as well as cite the statutory provision alleged to have been violated. 725 ILCS 5/111-3(a). It may be amended at any time to correct a formal defect, including a miswriting. 725 ILCS 5/111-5. Amendment is permissible if the change is not material or does not alter the nature and elements of the offense. Formal amendment is warranted especially where there is no resulting surprise or prejudice to the defendant or where the record shows that the defendant was otherwise aware of the actual charge. Generally, an error in the citation of the statute giving rise to a charge is a mere technical defect subject to amendment.

The State charged defendant with a violation of 720 ILCS 570/407(b)(2) in that he

possessed with intent to deliver in violation of 720 ILCS 570/401(c) more than 1 gram but less than 15 grams of a substance containing cocaine. At arraignment, the court brought to the prosecutor's attention that §407(b)(2) applies to an amount less than one gram, but the prosecutor declined to correct the inconsistency. Almost two years later, over defense objection, the court permitted the State to amend the charge to a violation of §407(b)(1), conforming the code section to the language of the body of the charge.

The amendment was proper because it was not material and only corrected a formal defect. The amendment related only to the statutory citation, not to the factual allegations. Defendant could not credibly complain surprise because the facts alleged did not change. It was clear all along that the statutory citation was a miswriting.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

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§29-6
Statute of Limitations

People v. Chenoweth, 2015 IL 116898 (No. 116898, 1/23/15)

Under section 3-5(b) of the Criminal Code, a felony prosecution must be commenced within three years after the offense was committed. 720 ILCS 5/3-5(b). Section 3-6, however, extends the statute of limitations in certain situations. For theft involving breach of a fiduciary obligation, section 3-6(a) allows a prosecution to begin "within one year after the discovery of the offense by the aggrieved person." In the absence of such discovery, the prosecution must begin "within one year after the proper prosecuting office becomes aware of the offense."

Defendant's stepmother gave defendant power of attorney, allowing her to carry out various financial transactions without prior notice or approval, including the sale of her house in 2005. In 2008, the police learned that defendant had written unauthorized checks on the stepmother's account and proceeds from the house sale were missing. A police officer informed the stepmother of the unauthorized transactions and missing proceeds on December 5, 2008.

The officer continued his investigation, eventually determined that defendant's conduct was illegal, and presented his findings to the prosecutor in January 22, 2009. The prosecutor indicted defendant with financial exploitation of an elderly person on December 21, 2009.

Defendant argued that the indictment was barred by the statute of limitations since she was charged more than one year after the date the aggrieved person, her stepmother, discovered the offense. According to defendant, her stepmother discovered the offense when the officer informed her of the suspicious transactions and missing proceeds on December 5, 2008, more than one year before defendant was charged.

The Supreme Court rejected this argument, holding that the stepmother did not discover the offense when she spoke to the officer on December 5, 2008. The phrase "discovery of the offense" means gaining knowledge or finding out that a criminal statute has been violated. After the December 5th conversation, however, the stepmother only suspected that a crime may have occurred. Because defendant had power of attorney to carry out financial transactions without advance notice or approval, further investigation was needed to determine whether defendant had actually violated a criminal statute.

Since the stepmother did not discover the offense on December 5, 2008, the one-year extension began on January 22, 2009, when the "proper prosecuting office" became aware of

the offense. The indictment on December 21, 2009 was thus within the one-year extension period.

(Defendant was represented by Assistant Defender Janieen Tarrance, Springfield.)

People v. Chenoweth, 2013 IL App (4th) 120334 (4-12-0334, 10/11/13)

1. Generally, a three-year statute of limitations applies to the offense of unlawful financial exploitation of an elderly person. (725/ILCS 5/3-5(b)) However, 720 ILCS 5/3-6 creates an extended statute of limitations for the prosecution of theft involving a breach of a fiduciary obligation. Under §3-6, such prosecutions may be commenced within one year after the "the discovery of the offense by an aggrieved person, . . . or in the absence of such discovery, within one year after the proper prosecuting authority becomes aware of the offense," provided that the statute of limitations is not extended by more than three years.

2. Defendant was convicted of unlawful financial exploitation of an elderly person for allegedly taking money from a woman for whom defendant held power of attorney. The court concluded that where more than three years had passed since the offense, the one-year-extension under §3-6 began to run when the victim spoke to police during their investigation and told them that she had not given defendant permission to write several checks. Thus, the State had one year from the date of the conversation to bring criminal charges.

The court rejected the argument that the one-year extension did not begin to run until the victim knew that defendant had illegally misappropriated a specific sum of money in breach of her fiduciary duties. The extended statute of limitations commences upon "the discovery of the offense by an aggrieved person," and does not require that the aggrieved person have knowledge that each element of an offense has occurred. Because the victim discovered when she spoke to the officer that defendant had written unauthorized checks on the victim's account, she discovered at that time that defendant had misappropriated her money. Therefore, the extended statute of limitations began to run on that date.

The State had one year from the date of the conversation to commence the criminal prosecution. Because the indictment was not filed for more than one year after the conversation, the extended statute of limitations had expired. The conviction for unlawful financial exploitation of an elderly person was vacated.

(Defendant was represented by Assistant Defender Janieen Terrance, Springfield.)

People v. Leavitt, 2014 IL App (1st) 121323 (No. 1-12-1323, 11/21/14)

1. Under Illinois law, the statute of limitations is tolled when an indictment is returned or an information is filed. The Appellate Court concluded that where an indictment was returned within the three-year-statute of limitations, but was sealed because there was an ongoing investigation into police misconduct, no statute of limitations violation occurred when the indictment was unsealed after the statute of limitations had expired.

2. The court rejected arguments that due process and the constitutional right to a speedy trial were violated where the indictment was sealed for 12½ months, until after the statute of limitations had expired. The court concluded that the factors used to determine whether the constitutional right to a speedy trial has been violated also apply to the due process question. Those factors are: (1) the length of the delay, (2) defendant's assertion of his speedy trial right, (3) the reason for the delay, and (4) any prejudice to the defense.

Here, the delay was longer than one year and was therefore presumptively prejudicial. However, because defendant was unaware of the sealed indictment, his failure to assert his speedy trial right was not a factor.

The court found that the purpose for sealing the indictment - to permit law enforcement

to complete a sensitive, ongoing investigation into wrongdoing in the Park Ridge Police Department - was clearly proper and served the interests of justice. Thus, the third factor favored a finding that there was no speedy trial or due process violation.

Concerning the final factor, the court held that the sealing did not cause prejudice. In assessing prejudice to the accused from a delay, courts consider three interests that are protected by the speedy-trial right: (1) prevention of oppressive pretrial incarceration, (2) minimization of anxiety and concern on the part of the accused, and (3) limiting the possibility that the defense will be impaired. Because defendant was not incarcerated and was unaware that an indictment had been returned, only the third factor was relevant here.

Defendant did not claim that his defense to the charge had been prejudiced by the sealing of the indictment. However, he stated that he delayed changes in his personal and professional life until after he thought the statute of limitations had expired. The court concluded that because such changes were unrelated to defending against the charge, they did not create prejudice under the final factor.

The trial court's order dismissing the indictment on statute of limitation grounds was reversed.

People v. Lutter, 2015 IL App (2d) 140139 (No. 2-14-0139, 5/18/15)

1. The statute of limitations for a misdemeanor is generally six months. When the charge shows on its face that the offense was not committed within the applicable limitations period, an element of the State's case is to allege and prove the existence of some fact which invokes an exception to the statute of limitations. See **People v. Morris**, 135 Ill. 2d 540, 554 N.E.2d 150 (1990).

The court concluded that where the information "vaguely alleged facts" that might arguably toll the statute of limitations, but the State offered no evidence of those facts during trial, defendant's motion for acquittal should have been granted. Under **Morris**, the State had the burden to both allege and prove facts which would extend the statute of limitations.

2. Because an exception to the statute of limitations was an element of the State's case, defendant did not forfeit the issue by failing to make a pretrial motion to dismiss the information. Due process prohibits requiring a defendant to move to dismiss a charge on which the State failed to prove an element, because the burden of establishing all of the elements of the State's case cannot be shifted to the defense.

The court distinguished this case from one where the charge does not allege that the offense was outside the statute of limitations and that an exception to the limitations period applied. In that situation, the defendant can only raise the issue by filing a motion to dismiss. By contrast, where the State alleges in the charge that there is an exception to the statute of limitations, that exception becomes an element of the State's case and must be proven.

People v. Macon, ___ Ill.App.3d ___, 920 N.E.2d 1224 (1st Dist. 2009) (No. 1-07-3378, 12/18/09)

1. Illinois law requires that unless the statute of limitations is extended, a prosecution for a felony offense must commence within three years of the commission of the offense. The purpose of the statute of limitations is to minimize the danger of punishment for conduct which occurred in the distant past, to encourage the State to be diligent in its investigation, and to provide the trier of fact with fresh evidence that is not distorted by the passage of time.

Because a felony prosecution can be commenced only by indictment or information, a complainant alleging a felony does not commence a prosecution for statute of limitations purposes. Instead, the date on which the indictment or information is filed marks the

commencement of a felony prosecution and tolls the running of the statute of limitations.

2. The statute of limitations can be extended in some situations, and certain periods can be excluded from the statute of limitations. Such exceptions are not self-executing, and must be alleged on the face of the indictment along with the specific facts and exception that would suspend the statute.

Where the offense in question was committed on May 20, 2002, the statute of limitations expired on May 20, 2005. Thus, an indictment filed April 20, 2006 was defective on its face. The court noted, however, that the prosecution could refile the indictment with facts giving rise to an extension of the limitation period.

3. The court rejected the State's argument that the rule defining the initiation of adversarial proceedings for purposes of the right to counsel should be applied when considering whether the statute of limitations has been tolled.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

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